110-720

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 187.

OTIS N. CUTLER, PLAINTIFF IN ERROR,

vs.

GEORGE L. KOUNS AND JOHN KOUNS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1880.

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York, in the second circuit, this twelfth day of October, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] J. M. DEUEL, *Clerk.*

4 N. Y. supreme court.

GEORGE L. KOUNS & JOHN KOUNS *ag'st* OTIS N. CUTLER. } Summons for money demand on contract. (Com. not ser.)

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of this court, at the city hall of the city of New York, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 74 Wall street, in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of thirty thousand seven hundred and seventy-seven $\frac{50}{100}$ dollars, with interest from the twentieth day
5 of June, one thousand eight hundred and sixty-five, besides the cost of this action,

Dated July 1st, 1871.

BEEBE, DONOHUE & COOKE,
Plaintiff's Attorneys.

(Endorsed:) N. Y. supreme court. George L. Kouns & John Kouns against Otis N. Cutler. Summons. Beebe, Donohue & Cooke, plaintiff's attorneys.

6 Circuit court of the United States of America for the southern district of New York, in the second circuit.

To the judges of the circuit court of the United States of America for the southern district of New York in the second circuit:

The petition of Otis N. Cutler respectfully showeth that on or about the 6th day of July, in the year one thousand eight hundred and seventy-one, a civil suit was brought in the supreme court of the State of New York by George L. Kouns and John Kouns against your petitioner, by reason of certain acts done and proceedings had by your petitioner under authority or color of the act of Congress approved July 2d, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection," which said acts done and proceedings had under the said act of Congress, or under color thereof, were done and had by your petitioner under the authority and by the direction of the Executive
7 Government of the United States; that said suit was commenced by service of a sum'ons on your petitioner within the southern district of New York, for money demand on contract, and is now pending in the

said supreme court of the State of New York, and that no trial has been had therein.

Your petitioner therefore prays that, in pursuance of the act of Congress in such case made and provided, the said cause so commenced in the said supreme court may be removed therefrom and entered upon the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court.

And your petitioner will ever pray, &c.

OTIS N. CUTLER.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Otis N. Cutler, the above-named petitioner, being duly sworn, deposes and says that the matters set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

OTIS N. CUTLER.

Sworn to before me this 23d day of January, 1872.

W. F. MATHEWS,
Notary Public, N. Y. Co.

8 I, Noah Davis, certify that as counsel for the petitioner I have examined into the proceedings against him and have carefully inquired into all the matters set forth in the within petition, and that I believe the same to be true.

New York, Jan'y 25th, 1872.

NOAH DAVIS,
Counsellor of the said Circuit Court.

(Endorsed:) U. S. circuit court. Otis N. Cutler ag'nst George L. Kouns et al. Petition to remove cause. Noah Davis, def't's att'y. Beebee, Donahue & Cook, p'ff' atty's. Filed Jan. 25, 1872.

9 The President of the United States of America to the jugdes of the supreme court of the State of New York, greeting:

We for certain reasons being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Otis N. Cutler, defendant, by George L. Kouns & John Kouns, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 5th day of February, 1872, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the United States, the 25th day of January, in the year one thousand eight hundred and seventy-two.

[L. S.] KENNETH G. WHITE, *Clerk.*

NOAH DAVIS,
Defendant's Attorney.

10 (Indorsed:) U. S. circuit court. Otis N. Cutler vs. George L. Kouns & al. Copy certiorari. Noah Davis, defendant's attorney.

Take notice that the within is a copy of certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Jan. 25th, 1872.

Yours,

NOAH DAVIS,
Defendant's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, Jan 25, 1872.

BEEBE, DONOHUE & COOKE,
Plaintiffs' Attorney'.

11 U. S. circuit court, S. dist. of New York.

GEORGE L. KOUNS & JOHN KOUNS)
ag'st
OTIS N. CUTLER.)

We consent that Jefferson Clark be substituted as attorney for the plaintiffs in this action in our place and stead.

Dated New York, Sept. 22, 1874.

BEEBE, DONOHUE & COOK,
Att'ys for Plaintiffs.

12 At a special term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the U. S. court building, No. 41 Chambers street, in the city of New York, the 10th day of October, A. D. 1874.

Present: The honorable Samuel Blatchford, U. S. judge.

GEORGE L. KOUNS AND JOHN KOUNS)
vs.
OTIS N. CUTLER.)

On reading and filing the consent of Beebe, Donohue & Cooke, plaintiffs' attorneys, on motion of Jefferson Clarke, it is ordered that said Jefferson Clark be, and he is hereby, substituted as attorney for plaintiffs herein in place of said Beebe, Donohue & Cooke.

SAMUEL BLATCHFORD.

13 (Indorsed:) U. S. circuit court. George L. Kouns and ano. vs. Otis N. Cutler. Order substituting attorney. Jefferson Clark, p'ffs' att'y, 93 Nassau st., N. Y. Filed Oct. 12, 1874.

14 Circuit court of the United States for the southern district of New York.

GEORGE L. KOUNS & JOHN KOUNS, PLAINTIFFS,
vs.
OTIS N. CUTLER, DEFENDANT.

The amended complaint or declaration of the plaintiffs herein respectfully shows to this court:

First. That at the several times hereinafter mentioned the said plaintiffs were and now are copartners in business, and that at the time of the commencement of this action the plaintiffs were and now are citizens of the State of Louisiana, and, as the plaintiffs are informed and believe, the defendant then was and now is a citizen of the State of New York.

Second. That in the month of June, 1865, the plaintiffs were the owners of about nine hundred bales of cotton of the value of one hundred and twenty-three thousand one hundred and twenty dollars, which was
15 then laden on board the steamboats New Era and T. S. Conoly, in convoy, owned by plaintiffs, and of which the plaintiff George L. Kouns was master, which vessels so laden were lawfully lying at the port of New Orleans.

That said plaintiffs were then and there citizens of the United States and of said State of Louisiana, and then and there duly took an oath of allegiance to the Government of said United States as citizens thereof.

That thereafter, on or about the 12th day of June, 1865, the defendant wrongfully and forcibly took possession of the whole of said cotton, and wrongfully and by means of a guard of armed men acting under the direction of said defendant forcibly prevented plaintiffs from removing the same or any part thereof, and wrongfully and forcibly retained and refused to deliver the same or any part thereof to these plaintiffs unless these plaintiffs would pay him, said defendant, the sum of thirty thousand seven hundred and seventy-seven $\frac{50}{100}$ dollars, and these plaintiffs so being under duress thereupon did pay to said defendant, under pro-
16 test and unwillingly, and the defendant did forcibly and wrongfully take from said plaintiffs said sum of thirty thousand seven hundred and seventy-seven $\frac{50}{100}$ dollars, as a condition of surrendering to these plaintiffs their said cotton, of which the sum of thirteen thousand six hundred and ninety-four $\frac{92}{100}$ dollars was so extorted and paid on the 12th day of June, 1865, and the sum of seventeen thousand and eighty-one $\frac{58}{100}$ dollars was so extorted and paid on the 20th day of June in the same year.

Wherefore these plaintiffs demand judgment herein against the defendant for the sum of thirty thousand seven hundred and seventy-seven $\frac{50}{100}$ dollars, with interest on thirteen thousand six hundred and ninety-four $\frac{92}{100}$ dollars thereof from the 12th day of June, 1865, and on the sum of seventeen thousand and eighty-one $\frac{58}{100}$ dollars thereof from the 20th day of June, 1865, besides costs.

JEFFERSON CLARK,
Plaintiffs' Attorney, 99 *Nassau St., N. Y.*

(Endorsed:) U. S. circuit court. George L. Kouns & John Kouns, plaintiffs, vs. Otis N. Cutler, defendant. Amended complaint. Jefferson Clark, attorney for pl'ffs.

17 BENNETT BUILDING, *N. Y. City.*

To S. L. Woodford, esq., U. S. att'y, defendant's att'y:

SIR: Please take notice that within is a copy of the plaintiffs' amended complaint or declaration in the within-entitled action, and that the defendant is required to answer or plead to the same within twenty days from service thereof on you.

Dated Jan'y 22, 1878.

JEFFERSON CLARK,
Plaintiffs' Att'y.

CITY AND COUNTY OF N. Y., *ss:*

William C. Tallman, being duly sworn, says that he is over sixteen years of age; that on the 22d day of January, 1878, at the New York post-office building, in the city of New York, he served the annexed amended complaint and notice to plead on Stewart L. Woodford, esq., attorney for defendant in the within-entitled action by delivering a true copy thereof to and leaving the same with a clerk in charge of his office, he at the time being absent from said office.

WILLIAM C. TALLMAN.

18 Sworn to before me this 22d day of January, 1878.

H. VAN VECHTER,
Notary Public, N. Y. Co.

19 Circuit court of the United States for the southern district of New York.

GEORGE L. KOUNS & JOHN KOUNS
against
OTIS N. CUTLER.

1. The defendant above named, by his attorney, Stewart L. Woodford, United States attorney for the southern district of New York, admits that the plaintiffs were partners and citizens of the State of Louisiana, and that the defendant was and now is a citizen of the State of New York.

2. Alleges that he has no knowledge or information sufficient to form a belief whether the plaintiffs were the owners of about 900 bales of cotton in the month of June, 1865, as alleged in said complaint or declaration, and therefore denies the same.

3. Denies that on or about the 12th day of June, 1865, this defendant wrongfully and forcibly took possession of the whole of said cotton, and wrongfully and by means of a guard of armed men acting under direction of this defendant forcibly prevented the plaintiffs from re-

20 moving said cotton or any part thereof; and denies that he wrongfully and forcibly detained and refused to deliver said cotton or any part thereof to these plaintiffs unless said plaintiffs would pay him the sum of $30,777.50, as alleged in said complaint or declaration; and

denies that he did forcibly and wrongfully take from said plaintiffs said sum of $30,778.50 as a condition of surrendering to these plaintiffs said cotton; and denies that he extorted from these plaintiffs any sums of money whatever at the times and in the manner in said complaint or declaration alleged; and denies that the plaintiffs paid said sum of money to the defendant under protest and unwillingly; and alleges that at the times alleged in said complaint or declaration the defendant was a purchasing agent of the United States, duly authorized by the Secretary of the Treasury, with the approval of the President of the United States, to purchase said cotton, and was located as such purchasing agent at the port of New Orleans, in the State of Louisiana; and further alleges that the said sums of money, to wit, the sum of $17,081.58 and the sum of $13,694.92, alleged by these plaintiffs in their said complaint or declaration to have been paid by them to this defendant, were paid by Harlow J. Phelps
21 & Co., who claimed to be the owners thereof, and not by these plaintiffs to defendant, as purchasing agent for the United States aforesaid, voluntarily and in part payment of the purchase of certain cotton which had been brought by these plaintiffs from Jefferson, in the State of Texas, and Shreveport, in the State of Louisiana, in territory of the United States lying west of the Mississippi River, being then and there in districts declared to be in a state of insurrection against the lawful Government of the United States by the proclamation of the President of the United States under date of April 2d, 1863, to the port of New Orleans, in the State of Louisiana, being then and there a port or place excepted by the President of the United States by his said proclamation of April 2d, 1863, from the provisions in said proclamation contained respecting commercial intercourse with States in a state of insurrection against the United States, and a place designated by the Secretary of the Treasury of the United States for the purchase for the United States by this defendant, as agent aforesaid, of the products of States declared to be in insurrection against the lawful Government of the United States, pursuant to the provisions of section 8 of an act of Congress approved
22 July 2d, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection," and the rules and regulations under said act made by the Secretary of the Treasury, with the approval of the President of the United States; and said cotton being then and there the product of the insurrectionary districts aforesaid, was purchased by this defendant of Harlow J. Phelps & Co., who claimed to be the owners thereof, and not of these plaintiffs, and was resold by this defendant as purchasing agent, aforesaid to the said Harlow J. Phelps & Co., pursuant to the provisions of said act of Congress and the rules and regulations aforesaid.

4th. And for a further, separate, and distinct answer to the complaint or declaration the defendant alleges that the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says at the several times set forth in the plaintiffs' complaint or declaration as the times of the commissions of the supposed grievances therein laid to this defendant's charge he, the said defendant, was an officer or agent
23 duly authorized by the Secretary of the Treasury, with the approval

of the President of the United States, to purchase for the United States any products of States in insurrection that might be offered and delivered to him in the city of New Orleans, in the State of Louisiana, pursuant to the provisions of the 8th section of the act of Congress approved July 2d, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection;" that the said nine hundred bales of cotton mentioned in said complaint, which the plaintiffs allege in said complaint or declaration were wrongfully and forcibly taken from them by this defendant, and respecting which these plaintiffs allege in said complaint or declaration that this defendant extorted from them the sum of thirty thousand seven hundred and seventy-seven dollars and fifty cents, had, prior to the commencement of this suit, to wit, on or before the 12th day of June, 1865, and the 24th day of June, 1865, come from Jefferson, in the State of Texas, and Shreveport, in the State of Louisiana, in territory of the United States lying west of the Mississippi River, which said States had been declared to be in a state of insur-
24 rection against the lawful Government of the United States by the proclamation of the President of the United States dated April 2d, 1863, to the port of New Orleans, in the State of Louisiana, being then and there a port or place excepted by the President of the United States from the provisions contained in said proclamation respecting commercial intercourse with States in a state of insurrection against the United States, and a place designated by the Secretary of the Treasury, pursuant to the provisions of the 8th section of said act of July 2d, 1864, for the purchase of the products of States declared to be in a state insurrection as aforesaid, and pursuant to the rules and regulations made by the Secretary of the Treasury, with the approval of the President of the United States, under said act; and said cotton was purchased for the United States by this defendant, as such purchasing agent, from Harlow J. Phelps & Co., and was resold by the defendant, as purchasing agent aforesaid, to said Harlow J. Phelps & Co.; and all the provisions of said act and rules and regulations were complied with by this defendant, and the moneys arising from the sale of said cotton to said Harlow J. Phelps & Co., after payment of the purchase-money and other expenses connected therewith, were paid by this defendant into the Treasury of the United States immediately thereafter, and before the commencement of this suit, pursuant to the provisions of said act.

25 Wherefore, by force of the statute in such case made and provided, to wit, section 3 of the act of Congress approved July 27th, 1868, entitled "An act regulating judicial proceedings in certain cases for the protection of officers and agents of the Government, and for the better defense of the Treasury against unlawful claims," the defendant says that the said plaintiffs have no legal cause of action herein, but are barred from such action, which by force of the statutes aforesaid is exclusively within the jurisdiction of the Court of Claims.

5th. And for a further, separate, and distinct defense the defendant alleges that these plaintiffs ought not to have or maintain their aforesaid action, because he says that this action is brought against him for the recovery of moneys received by him as an officer or agent of the United

States in virtue and under color of an act of Congress approved July 2d, 1864, to wit, a purchasing agent duly authorized by the Secretary of the Treasury, with the approval of the President of the United States, which said act of Congress is entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection;" and that the moneys alleged by the plaintiffs to have been received by this de-
26 fendant from these plaintiffs with respect to the cotton aforesaid were received by him, as an officer or agent aforesaid of the United States, in the administration of and in virtue and under color of said acts of Congress; and which said cotton, being then and there the product of States declared to be in insurrection against the lawful Government of the United States by the proclamation of the President of the United States of April 2d, 1863, had been brought from said insurrectionary States to the port of New Orleans, in the State of Louisiana, being then and there a port or place excepted by the President of the United States from the provisions contained in said proclamation respecting commercial intercourse with States in a state of insurrection against the United States, and a place designated by the Secretary of the Treasury, at which place this defendant, as agent aforesaid, was authorized as aforesaid to purchase said cotton; and Harlow J. Phelps and Company, of New Orleans aforesaid, who claimed to be the owners of said cotton, entered into an agreement of sale of said cotton with this defendant, as agent aforesaid; and the moneys alleged to have been extorted and forcibly taken from these plaintiffs by this defendant were voluntarily paid by said Harlow J. Phelps & Co. to this defendant, in pursuance of said agreement of sale, in part payment of the purchase-money of said cotton, which was purchased by this
27 defendant, as agent aforesaid, and resold to said Harlow J. Phelps & Co. by this defendant, as agent aforesaid; and the moneys received by this defendant from said Harlow J. Phelps & Co. as aforesaid were paid by this defendant into the Treasury of the United States, in conformity with the provisions of said act. Whereby and by force of the statute in such case made and provided, to wit, section 3 of an act of Congress approved July 27, 1868, entitled "An act regulating judicial proceedings in certain cases for the protection of officers and agents of the Government, and for the better defense of the Treasury against unlawful claims," the defendant says these plaintiffs have no legal suit or right of action against him.

6th. And for a further, separate, and distinct defence the defendant alleges that the moneys alleged by the plaintiffs in their said complaint or declaration to have been taken from said plaintiffs by this defendant were received by this defendant on account of cotton which had been bought by these plaintiffs from Jefferson, in the State of Texas, and Shreveport, in the State of Louisiana, in territory of the United States lying west of
28 the Mississippi River, which said been by the proclamation of the President of the United States of April 2d, 1863, declared to be in insurrection against the lawful Government of the United States, and which said States were then and there in a state of insurrection against the lawful Government of the United States, to the port of New Orleans, in the State of Louisiana, being then and there a port or place excepted by

the President of the United States from the provisions contained in said proclamation respecting commercial intercourse with States in a state of insurrection against the United States, and a place designated by the Secretary of the Treasury, pursuant to the provisions of section 8 of an act of Congress approved July 2d, 1864, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property and the prevention of frauds in States declared in insurrection," as a place for the purchase of the products of States declared in insurrection, and pursuant to the provisions of said act and the rules and regulations made by the Secretary of the Treasury, with the approval of
29 the President of the United States under said act; and said cotton, being then and there the products of States declared to be in a state of insurrection against the lawful Government of the United States as aforesaid, was so brought to the port of New Orleans aforesaid for the purpose of being sold to this defendant, this defendant being then and there an agent authorized by the Secretary of the Treasury, with the approval of the President of the United States, to purchase said cotton for the United States, pursuant to the provisions of section 8 of said act approved July 2d, 1864, and the rules and regulations aforesaid; and this defendant, as agent aforesaid, then and there purchased said cotton of Harlow J. Phelps and Company, of New Orleans aforesaid, who claimed to be the owners of said cotton, and resold the same to said Harlow J. Phelps and Company, pursuant to the provisions of said act, at a price agreed upon between this defendant and said Harlow J. Phelps and Company, in conformity with the provisions of said act and the rules and regulations aforesaid; and the moneys arising from the sale thereof to said J. Phelps and Company, after payment of the purchase-money and the other expenses con-
30 nected with the said purchase, were paid by this defendant into the Treasury of the United States; and all the acts done by this defendant respecting said cotton were done by him as an officer or agent of the United States, viz, as agent to purchase as aforesaid, and in the administration of and in virtue and under color of said acts of Congress and the rules and regulations aforesaid, and were done and committed by this defendant, as such officer or agent as aforesaid, during the rebellion which was in existence at the time of the enactment of the act of Congress approved March 3d, 1863, entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases;" and the moneys received by this defendant as alleged in the complaint or declaration were received by this defendant from said Harlow J. Phelps and Company by virtue and under color of authority derived from and exercised under the said acts of Congress, and all acts done and committed by this defendant respecting said cotton were done and committed by this defendant by virtue and under color of authority derived from and exercised under these said acts
31 of Congress; and the causes of action alleged against this defendant by the plaintiffs in their said complaint of declaration did not nor did any or either of them accrue at any time within two years next before the commencement of this action.

7th. And for a further, separate, and distinct defense the defendant alleges that the plaintiffs ought not to have or maintain their aforesaid action against him, because he says that the several supposed causes of

action in the said declaration or complaint mentioned did not, nor did any or either of them, accrue at any time within six years next before the commencement of this suit.

Wherefore the defendant demands that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Att'y for Def't.

(Endorsed:) U. S. circuit court, southern district of New York. George L. Kouns and John Kouns versus Otis N. Cutler. Answer. Stewart L. Woodford, United States attorney for the southern district of New York.

Due service of a copy of the within and of the notice above admitted this day of , 187 .

U. S. circuit court. Filed Apr. 2, 1878.
JOHN I. DAVENPORT, *Clerk.*

32 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Monday, the 16th day of February, in the year of our Lord one thousand eight hundred and eighty.

Present: The honorable William J. Wallace, judge.

GEORGE L. KOUNS ET AL.
vs.
OTIS N. CUTLER.

On motion of Jefferson Clark, esq., of counsel for the plaintiffs in the above-entitled case, ordered trial.

Jurors sworn: James Owens, Robert L. Mulford, Edmund H. Martine, Stanly H. Ray, Abraham Lent, Eber P. Fish, Charles G. Harmer, Nehemiah S. Bates, Nathaniel R. Mosley, Sidney P. Ingraham, Ferdinand R. Walker, William H. Davis.

Mr. Clark opens the case on the part of the plaintiffs.

Evidence for the plaintiff:

Geo. L. Kouns sworn.

33 Dep. of W. T. Boardman read.
" " Noah Scoville "
" " Aseneth A. Phelps "
" " Robert J. Wingate "
" " J. S. Cooper "
" " Edgar Knott "
" " Martin L. Naerr sworn.

L. B. Clark, esq., ass't U. S. attorney, of counsel for the defendant, opens the case on the part of the defendant.

Evidence for the defendant:

Otis N. Cutler sworn.

34 At a stated term of the circuit court of the United States of

America for the southern district of New York, in the second circuit, held at the United States court-room in the city of New York, on Tuesday, the 14th day of February, in the year of our Lord one thousand eight hundred and eighty.

Present: The honorable William J. Wallace, judge.

GEORGE L. KOUNS ET AL.
vs.
OTIS N. CUTLER.

This cause being still on trial, the jurors sworn in it are called and severally answer to their names.

Evidence for the defendant:

Otis N. Cutler recalled.
Thos. O'Meara sworn.
Martin L. Naerr recalled.

Evidence for the plaintiffs:

Frank Dunphy sworn.

Mr. Clark moves that the court direct the jury to find a verdict for the defendant, and is heard in support of said motion.

35 The court denies said motion, and Mr. Clark excepts to the ruling of the court in so doing.

Mr. Clark sums up the case on the part of the defendant.

H. C. Bliss, esq., of counsel for plaintiffs, sums up the case on the part of the plaintiffs.

Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiffs for the sum of twenty-nine thousand six hundred and seventy-nine dollars and fifty-five cents, and so say they all.

On motion of Mr. Clark, ordered that defendant have thirty days' stay of proceedings herein within which to prepare and serve a bill of exceptions.

On like motion, it is further ordered that a certificate of probable cause be entered herein.

Immediately after the charge, and prior to the retiring of the jury, counsel for the respective parties herein respectively except to certain portions of the charge, which they state.

A copy from the minutes.

JOHN I. DAVENPORT, *Clerk.*

36 Circuit court of the United States for the southern district of New York.

GEORGE L. KOUNS AND JOHN KOUNS, PLAINTIFFS,
vs.
OTIS N. CUTLER, DEFENDANT.

This action having been commenced in the supreme court of the State of New York on the 6th day of July, 1871, by personal service of summons upon the defendant; and the defendant having thereafter, on the 20th day

of July, 1871, appeared herein, by his attorney; and thereafter, upon petition of defendant, the said action having been on the 5th day of February, 1872, duly removed to this court; and it having been duly ordered that all proceedings herein subsequent to said date be taken in this court; and an issue of fact herein having been duly joined on the second day of April, 1878, by service of defendant's answer to the plaintiffs' amended complaint; and the said issue having been brought to trial at a term of said circuit court commencing on the third Monday of October, 1879, and trial on the 16th & 17th days of February, 1880, being had,
37 before Hon. William J. Wallace, district judge of the United States for the northern district of New York, duly assigned to hold said court, and a jury; and the jury having on the 17th day of February, 1880, duly rendered a verdict herein in favor of the plaintiffs against the defendant for the sum of twenty-nine thousand six hundred and seventy-nine dollars and fifty-five cents; and thereafter, on the 9th day of September, 1880, the plaintiffs' costs having been duly taxed and adjusted at the sum of one hundred and forty-four $\frac{75}{100}$ dollars, exclusive of interest on said verdict, and the interest on said verdict from the date thereof to the present date having been completed and ascertained to be the sum of ten hundred and fourteen dollars: Now, on motion of Jefferson Clark, plaintiffs' attorney, it is adjudged by the court that George L. Kouns and John Kouns, the plaintiffs, recover of Otis N. Cutler, the defendant, the sum of thirty thousand six hundred and ninety-three dollars and 55 cents, the amount of said verdict and interest, together with the sum of one hundred
38 and forty-four dollars and seventy-five cents costs, altogether amounting to the sum of thirty thousand eight hundred and thirty-eight dollars and thirty cents.

Judgment signed this 11th day of Sept. A. D. 1880.

J. M. DEUEL,
Deputy Clerk.

(Endorsed:) U. S. circuit court, so. dist. of N. Y. Geo. L. Kouns et al. vs. Otis N. Cutler. Judgement roll. Jefferson Clark, pl't'ffs' att'y 99 Nassau st., N. Y. City. 30. U. S. circuit court. Filed Sep. 11, 1880. John I. Davenport, clerk.

39 *Bill of exceptions.*

Circuit court of the United States for the southern district of New York.

GEORGE L. KOUNS AND JOHN KOUNS)
vs.
OTIS N. CUTLER.)

The issues of fact in this cause having come on to be tried at a stated term of this court, held at the city of New York, on the 16th and 17th days of February, 1880, by the honorable William J. Wallace, district judge of the United States for the northern district of New York, duly assigned to hold this court, the following proceedings thereupon took place:

For the plaintiffs, Jefferson Clark and H. C. Bliss, esquires, appeared.

For the defendant, Samuel B. Clarke, esq., assistant district attorney, appeared.

Plaintiffs' counsel having moved the trial of the cause, and having opened his case to the jury, duly empanelled and sworn, called as a
40 witness GEORGE L. KOUNS, one of the plaintiffs, who, being duly sworn on his own behalf, testified as follows:

That in May, 1865, he was on the Red River at Cane Point plantation, opposite Shreveport, Louisiana; that the plaintiffs owned said plantation; that he was planting and living on said plantation; that the plaintiffs were also engaged in steamboating, with headquarters at said plantation; that they had about 950 bales of cotton—about 600 bales at Cane Point and the rest at Jefferson, Texas; that none of this cotton was ever the property of the Confederate States; that he, the witness, carried the cotton to New Orleans; that he obtained a permit or pass from Gen. Herron, a United States officer, about 35 miles above Alexandria, which is about 250 miles from Shreveport; that the paper produced is said permit or pass; that the signature thereto is in Gen. Herron's handwriting.

(Counsel for the plaintiffs thereupon offered the permit, dated June 4th, 1865, in evidence.

41 Defendant's counsel objected on the ground of immateriality; which objection was overruled by the court, and defendant's counsel then and there duly excepted.

Plaintiffs' counsel then offered in evidence a certified copy of general order No. 3, headquarters Military Division of the Southwest.

Defendant's counsel objected on the ground of immateriality; which objection was overruled by the court, and defendant's counsel then and there duly excepted.

The permit and general order were then read in evidence. Copies thereof are hereto annexed, marked Plaintiffs' Exhibits A & B.)

The witness, proceeding, then said that though the permit mentions only the steamboat New Era, the T. S. Conlay, plaintiffs' other boat, on which was a portion of the cotton, lay alongside and was in convoy of the New Era when the permit was given; that after leaving Alexandria the Conlay was impressed to tug a captured Confederate gunboat which
42 was disabled, and was thereby detained some twenty-four hours; that he arrived with the New Era in New Orleans about sundown on the 6th day of June, 1865; that a lieutenant of the United States Army came on board with a file of soldiers and took possession of the boat and cargo; that the next morning, June 7th, 1865, before the arrival of the Conlay, witness went to the office of Mr. Cutler, the defendant; that he did not see the defendant there; that there were several clerks apparently in charge, one of whom was a Mr. Dunphy, whom witness had known before; that this was the first time witness had ever been in Mr. Cutler's office; that there were several other clerks who claimed to be a part of the office; that he talked with them as well as with Mr. Dunphy.

(The witness was then asked what was said in the conversation in defendant's office.

Defendant's counsel objected on the ground that none of the persons with whom witness talked were shown to be qualified to speak

43 for the defendant; which objection was overruled by the court, and defendant's counsel then and there duly excepted.)

The witness, proceeding, then said that they demanded one-fourth of the cotton before he could unload it; that he made an application to move the cotton to a press uptown where he wanted to store it; that they objected, saying he could do nothing till he gave the Government one-fourth, which he positively declined to do; that he went to Mr. Cutler's office because he was told on the boat by the lieutenant and by Mr. Cutler's messenger that he could do nothing without a permit from Mr. Cutler's office; that the next day he went again to defendant's office and had a talk with Dunphy, who told him it was no use to resist; that he, witness, would not get any cotton till he complied with the demands; that he, witness, told Dunphy, that they had the cotton under military seizure, and that he could not help himself, but give them one-fourth of the cotton he would not, but

44 that as he could not help himself he would give them one-fourth of the value of the cotton under protest; that they consented to take the money; that he, witness, made arrangements with and instructed Harlow J. Phelps & Co. to borrow the money and pay it, when the cotton was valued, under both a written and verbal protest; that on a former trial of this case the defendant, Mr. Cutler, testified that there was paid one-quarter of the value of the cotton on the New Era and T. S. Conlay, by Harlow J. Phelps & Co., by three checks, one dated June 12th, 1865, for $13,695.92; one dated June 15th, 1865, for $7,200.00; and the third dated June 20th, 1865, for $8,588.41, which sums he, Cutler, turned into the Treasury; that the checks produced were the ones Mr. Cutler testified about.

(The three checks signed by Harlow J. Phelps & Co. and endorsed by O. N. Cutler were then read in evidence. Copies thereof, marked Plaintiffs' Exhibits C, D, & E are hereto annexed.)

45 The witness, proceeding, then stated that Mr. Phelps subsequently sold the cotton for account of the plaintiffs; that Mr. Phelps reimbursed himself for the sums paid Cutler out of the proceeds of the sales; that Phelps rendered him, witness, accounts of the sales; that the papers produced were the accounts personally given him by Mr. Phelps.

(Said accounts were then offered and read in evidence. Copies thereof are hereto annexed, marked Plaintiffs' Exhibits F, G, & H.)

The witness, proceeding, then said that he was not present when the money was paid to Cutler; that he went back to Shreveport and returned to New Orleans on June 26, 1865; that he had never received back any of the money paid Cutler; that Harlon J. Phelps was a cotton factor; that he, Phelps, was at Shreveport during the war; that he came to New Orleans on the New Era with witness on the trip terminating June 6th, 1865; that on that trip the witness had no ship's papers; that

46 he made out the manifests at the custom-house after his arrival, declaring therein that Phelps was consignee of the cotton; that this was after the arrangement already referred to for turning the cotton over to Phelps as agent of the plaintiffs.

Being cross-examined, the witness said that he was not in Mr. Cutler's office after June 10th, 1865, the day on which the New Era started on her return trip to Shreveport; that prior to that day he was in Cutler's office three or four times; that he protested to everybody there, to persons

whom he recognized as employees of the office; that he could not name any of these employees except Mr. Dunphy. That on his arrival in New Orleans he took the oath of allegiance; that he was asked to take the iron-clad oath, but could not, as it contained clauses he could not swear to; that the signatures to the oaths on papers produced were his witnesses*ses* that said papers are the manifests of the New Era and T. S. Conlay.

47 (Said manifests of the New Era and T. S. Conlay, both sworn to June 7th, 1865, were then offered and read in evidence. Copies thereof are hereto annexed, marked "Defendant's Exhibits No. 1 & 2.")

The witness proceeding, then said that some of the cotton on the New Era was raised by the plaintiffs; that the rest on that boat was purchased; that the Conlay cotton was bought from John C. Murphy in May, 1865, before witness came down to New Orleans.

On redirect examination the witness said that he was never in the rebel army, but that the boats of plaintiffs had been used with their consent, and that the iron-clad oath implied something which he could not consistently swear to. That Captain Boardman was pilot of the New Era and Capt. Scovill was in charge of the T. S. Conlay on the trips in question.

48 Plaintiffs' counsel then read in evidence the deposition of W. T. Boardman and Noah Scovill, who therein corroborated the plaintiff. George L. Kouns' testimony on the points of ownership of the cotton and the seizure by soldiers on the arrival at New Orleans. Mr. Boardman testified that they started from Shreveport on their trip down the Red River about the middle of May, 1865, before the surrender of Confederate General Kirby Smith.

Plaintiffs' counsel then read in evidence the deposition of ASENATH A. PHELPS, who therein testified as follows:

My name is Asenath A. Phelps; I shall be forty years old on the 16th day of November, 1879; I reside at Kirkwood, near St. Louis, Missouri; my occupation is the care of four little children; I cannot say that I know any of the parties named in the title of the interrogatories, that is, either George L. Kouns, John Kouns, or Otis W. Cutler, but I have an indistinct recollection of having seen and possibly having been introduced to Mr. George L. Kouns; I never met or knew either of the other

49 parties, as far as I remember; I am the widow of Harlow J. Phelps, deceased; Mr. Phelps removed to St. Louis in 1873; he had formerly resided and been engaged in business in New Orleans since 1854 or 1855, except during the war; he died in St. Louis, Missouri, on the 25th day of October, 1877; both here and in New Orleans he was cotton merchant; I am the administratrix of his estate; as such administrix I have or had possession of all the personal property, books, papers, and effects belonging in his life-time to Mr. Phelps; I still have possession of all property so belonging to him, except a few articles sold by me; I have in my possession and under my control a letter-book which belonged to my late husband, purporting to contain copies of letters written by him and others in his employ, as clerks or agents, in the month of June, 1865; I annex said book to my deposition and mark same upon the back thereof upon a paper written by me and pasted thereon in my presence, also by writing on the outside of the first back in my own handwriting, and signed by me "Letters from June 9th to December 6th,

50 1865, Asenath A. Phelps;" on the outside of the first back of said book are written and pasted "Letters from June 9th to December (or Decem'r) 6th, 1865," in a handwriting unknown to me, which mark was on said book when it came into my possession; said book contains what purports to be a copy of a letter addressed to O. N. Cutler, esq., agent U. S. Treasury Department in June, 1865; said letter is found on pages 43 and 44 of said book; the figures 186 of 1865 of the date not appear, but I know that is the true year from other dates found in the book and from the fact that letters in said book purport to have been signed by R. J. Wingate, Edgar Nott, and others who were in the employment of my husband in New Orleans in the year 1865; the letter referred to on pages 43 and 44 is in the handwriting of Mr. Phelps, as are the majority of the letters in this book; of my own personal knowledge I know nothing of the matter in controversy.

Plaintiff's counsel then called ROBERT J. WINGATE as a wit-
51 ness on their behalf, who, being duly sworn, testified as follows:

That in 1865 he was in the employ of Harlow J. Phelps & Co., in New Orleans; that he had charge of the cash, assisted in the correspondence, and so on; that he was not a book-keeper; that he recognized the letter-book attached to Mrs. Phelps' deposition as the one used by Harlow J. Phelps & Co. in the year 1865 for the purpose of taking copies of the correspondence; that it was the invariable rule to take copies of all letters written in the office; that letters deliverable out of town were usually sent by mail; that letters deliverable in New Orleans were usually delivered in person; that there was no small boy or other person who was regularly charged with delivering letters.

The following question was then asked:

Q. Was it customary to send all letters which were copied in this letter-book?

52 (To this question defendant's counsel objected on the ground of immater'ality, which objection was overruled by the court, and defendant's counsel then and there duly excepted.)

The witness then answered the question.

A. Yes, sir.

Being cross-examined, the witness said that he went into the employ of Mr. Phelps in the latter part of August or in September, 1865.

Plaintiffs' counsel then read in evidence the deposition of J. S. Copes, which corroborated Mr. Wingate & Mrs. Phelps in the point that the book annexed to Mrs. Phelps' deposition is the press copy-book kept by Harlow J. Phelps & Co. in 1865.

Plaintiffs' counsel then offered to read in evidence the deposition of Edgar Nott, but on defendant's counsel admitting that the custom of Harlow J. Phelps & Co. in regard to conducting their business was the same in June, 1865, as it was in August, the deposition was withdrawn.

53 Plaintiffs' counsel then called MARTIN L. NOERN as a witness on their behalf, who, being duly sworn, testified as follows:

That he resided in Washington City; that he was employed in the

Treasury Department, and had charge of the records relating to abandoned and captured property; that among those records are the papers appertaining to the purchasing agency of Otis N. Cutler, at New Orleans; that he had in his possession a writing purporting to be a protest by Harlow J. Phelps, dated June 19th, 1865.

Being cross-examined, he said that he did not find this writing in the files of papers relating to Mr. Cutler's agency, but in a file relating to a claim made by Harlow J. Phelps for a return of twenty-five per cent.

On redirect examination he said that some of the papers connected with Harlow J. Phelps' claim were sent to Congress; that some of the correspondence relating to Phelps' claim from Cutler was sent with those papers to Congress; that he gathered from the papers that the ap-
54 plication on behalf of Harlow J. Phelps was referred to Cutler for report, and his report was placed with the papers; that he never saw the envelopes in which the writing in question came; that the first time he ever saw the writing in question it was with other papers relating to the claim of Harlow J. Phelps against the Government growing out of the transaction in suit.

(The said writing, purporting to be a protest, dated June 19th, 1865, having been submitted to the court, together with the contents of pages 43 & 44 of the letter-book before referred to, and the court having examined and compared the same together, plaintiffs' counsel then offered said writing in evidence.

Defendant's counsel objected on the ground it was not shown to have been received by the defendant before he covered the money
55 into the Treasury, or at any time, which objection the court overruled; and defendant's counsel then and there duly excepted.

Said writing was then read in evidence. A copy thereof, marked "Plaintiffs' Exhibit I," is hereto annexed.)

It was then admitted that the defendant was residing in Louisiana at the time of the transactions referred to; that he did not return to New York to reside till November, 1865, and that this action was commenced on July 6th, 1871.

Plaintiffs then rested.

Defendant's counsel having opened the defense to the jury, then called as a witness the defendant, OTIS N. CUTLER, who, being duly sworn on his own behalf, testified as follows:

That in 1864 & 1865 he was agent of the United States for the purchase of products of insurrectionary States in New Orleans, Louisiana; that he was appointed in 1864, organized an office in New Orleans in that month, ad-
56 vertised the regulations in the newspapers, and gave several thousands of permits for bringing products through the lines to be disposed of; that the course of business with reference to cotton was for the consignee to report the arrival of the cotton at witness' office, where witness purchased the cotton for the Government at three-quarters of the New York price; that sometimes, at the request of the consignee, the cotton was resold to him at its full value, and the transaction closed by the consignee giving him a check for the difference; that bills of purchase and sale passed between him and the consignee; that papers produced are the records of, 1st, a purchase of 550 bales cotton on steamboat

New Era, which arrived June 7th, 1865, from Harlow J. Phelps & Co.; 2d, a resale of the same cotton to Harlow J. Phelps & Co.; 3d, a purchase from Harlow J. Phelps & Co. of cotton on steamboat T. S. Conlay; and, 4th, a resale of the same cotton to Harlow J. Phelps & Co.

(These papers defendant's counsel then offered and read in evidence. Copies thereof are hereto annexed, marked "Defendant's Exhibits 3, 4, 5, & 6.")

The witness, proceeding, then said that the red figures on Ex. 4,
57 show the balance struck of the price and expenses; that the words "N. Y., 26 cents" on Ex. 3 indicate the New York market price, that being the price at which Phelps & Co. bought the cotton from witness; that 19½ cents was the price at which he purchased the cotton from Phelps & Co.; that this cotton was classified by expert samplers and weighed by the city weighers; that the amounts appearing on the New Era and Conlay papers of $247.50 and $158.40 are the sums paid for classifying and weighing, said expenses falling on the party who sold to the Government; that the checks, Plaintiffs' Exhibits C, D, and E, were the checks which closed these transactions; the check for $13,695.92 relates to the Conlay cotton, and the other two checks to the New Era cotton; that the amounts of the checks were one-fourth the value of the cotton on the two boats according to the latest New York quotations; that the words "Merchants' Press" and "Independent Press" on the backs of the purchase and sale papers were cotton presses not under the control of witness, to which the cotton was taken from the levee; that Mr. Phelps had been in witness's office in March, 1865,
58 having brought to New Orleans a cargo of cotton, which was sold to witness by other parties; that he, witness, knew nothing about a seizure of the New Era and Conlay cotton and never heard of it until this suit; that he never directed its seizure and never had any occasion to seize it; that he personally settled these transactions, that is, received the money; that witness had a great many transactions with various people and that no protest was ever made by anybody till after the business was closed, about July 5th to July 12th, 1865, when three or four protests were made; that with regard to the New Era and Conlay cotton no protest or claim was ever made to the witness that he had no right to take these sums of money till this suit was brought; that if there had been a protest, witness would be apt to remember it; that he never saw the writing purporting to be a protest, Plaintiffs' Ex. I, till after this suit was begun; that he did not send that writing to Washington among the papers from his office; that he never had any troops under his control and
59 never any occasion for using any force; that when witness was at his office none but himself had any authority to transact the business of the office; that when he was away his chief clerk, Mr. O'Meara, had such authority, but no one else had; that Mr. Dunphy was a clerk, but had no authority in transactions as to buying and selling cotton to witness, his duties being merely to compare accounts and vouchers and to make entries, and never did, to witness' knowledge, deal with any outsiders; that prior to June 7th, 1865, witness had been in Washington for two or three weeks; that he arrived in New Orleans on his return about June 7th; that he was in New Orleans on June 13th, 1865, the day the President made a proclamation removing certain restrictions; first received news of that proclamation on June 16th, when he received a telegram.

(Said telegram was then read in evidence. A copy thereof is hereto annexed, marked "Defendant's Ex. 7.")

Witness, proceeding, then said, that he had never known or met either of the plaintiffs till after this suit was commenced; that he paid into
60 the Treasury of the United States the money received on the New Era and Conlay transactions on or before July 12th, 1865.

Being cross-examined, the witness said:

That New Orleans is on the east bank of the Mississippi River; has no recollection of these transactions, except from the records and papers. I do not remember exactly when I arrived in New Orleans in June, 1865. I was there before the 10th, after returning from Washington; remained in New Orleans through the month of June, and till the office was closed; that the bills of resale are not signed by witness, because they belong to triplicates, and these were retained in the office; that witness opened every letter that came to the office while he was himself there, and in his absence the chief clerk opened the letters; that a paper might have been received in his office without his knowing it; that he might have seen a great many papers that came into the office without now remembering them, but not the Phelps protest or paper of that sort; but that protest might have been received in his office, seen by the clerks, and filed
61 away without his knowing; but it has no marks on it to indicate a filing; that if any one had tried to send cotton on which the 25 % had not been paid away from New Orleans witness would have tried to stop it, and would have seized it if he could; that when the office was closed several large boxes of papers were sent to Washington; that he did not see all the papers put into the boxes. I don't know that I could mention one paper that I saw put into the boxes. That no change of possession of the New Era & Conlay cotton took place under the bills of sale and resale, that being merely the form of taking the twenty-five per cent.

On redirect examination the witness said:

That in saying he had no recollection of the transactions except from the records, he meant about the details; that he recollected Phelps well, and recollected having had business with him; that there has never been any objections by the Government to witness, taking one-quarter of the value of the New Era and Conlay cotton, instead of taking the cotton itself.

Defendant's counsel then called as a witness TIMOTHY O'MEARA,
62 who, being duly sworn, testified as follows:

That in 1865 he was chief clerk under Mr. Cutler, in his office of purchasing agent at New Orleans; that there was a clerk in the office named Dunphy, who was one of the ordinary clerks, whose duties were to enter accounts in books and examine papers as to their correctness; that Dunphy had no authority to deal with any of the parties who came to sell cotton, and that witness never knew of his doing it; that Mr. Cutler, the purchasing agent, had entire control of the business of the office; that witness, as chief clerk, had charge of the routine work, and in Mr. Cutler's absence was authorized to answer questions and transact other business; that he, witness, knew of Harlow J. Phelps, but did not know the gentleman personally; that all he, witness, knows about the transaction involved in this suit is

that the cotton passed through the office and the twenty-five per cent. was paid as indicated in the records of the office in evidence, and he knows nothing about any particular condition or peculiarity of this cotton different from any other cotton; that he may have seen Kouns or Phelps at
63 the office, but cannot swear positively about it; that he thinks he would remember if any protest or claim had been made in writing against the legality of Mr. Cutler's action; that there might have been oral conversation which he knew nothing about; that if any oral protest had been made to him he would know something about it, but he don't remember anything of the kind; that he knows of nobody making any protest; that he, witness, while there, in the early part of June, 1865, had no authority to seize any cotton; that according to the usual course of business Mr. Cutler himself received and read communications addressed to him pertaining to his business as purchasing agent, and then they were filed; that it was intended to file all important papers, but there may have been some papers that were not filed; that the correspondence was filed in Cutler's desk, and in July, 1865, was forwarded to the Treasury Department; that he, witness, has no recollection of the writing purporting to be a protest, Plaintiffs' Ex. I; that he cannot say whether he ever filed that or not, but there is no evidence on the paper itself of having been filed, as was
64 usual.

Being cross-examined the witness said:

That he had no personal recollection of what was done aside from the papers in the case in this transaction; that if an envelope in which a letter came was important it might be filed.

Martin L. Noen, being recalled by defendant's counsel, further testified as follows:

That from his familiarity with the records of the Treasury Department he could say that the paper purporting to be a protest, Plaintiffs' Ex. I, could have got upon the files either from the records of Cutler or by being sent to the Department by one of the attorneys in the claim of Phelps, of whom there may have been several different sets, and that it may so have got upon the files equally as well in one way as in the other; that one of Mr. Phelps' attorneys was named Dezing.

Defendant's counsel then offered and read in evidence a certified copy of a letter from the Secretary of the Treasury to Mr. Dezing, and
65 a letter from Dezing to the Secretary; copies thereof are hereto annexed, marked "Defendant's Exhibits 8 & 9."

Witness being cross-examined said:

That in 1865 and 1866 it was not customary to make any endorsement or designation on the outside of enclosures belonging to letters received at the Department; that he, witness, had in addition to the writing, Plaintiffs' Ex. I, also found a copy thereof on file, but that he could not tell when said copy came to the Department.

The copy was then put in evidence.

The court then said that it was from the folding and other appearances for the jury to say whether Plaintiffs' Ex. I or this copy was the paper enclosed in the letter from Dezing to the Department.

Defendant's counsel then offered and read in evidence the amended Treasury regulations for the purchase of products of insurrectionary
66 States on Government account, dated May 9, 1865, copy of which is hereto annexed, marked "Defendant's Ex. 10;" also the executive order relating to the purchase of the products of insurrectionary States, dated Sept. 24th, 1864, a copy of which is hereto annexed, marked "Defendant's Ex. 11;" also an extract from the circular letter of the Treasury Department, dated June 27th, 1865, a copy of which is hereto annexed, marked "Defendant's Ex. 12," and called the court's attention to the President's proclamation of April 2d, 1863, June 13th, 1865, and June 24th, 1865.

Defendant then rested.

The plaintiffs' counsel then offered and read the following extract from the deposition of Edgar Nott: "I have made several copies of the protest at various times from the letter-press copy retained by the firm."

The plaintiffs' counsel then offered the press copy of the letter contained in the press copy-book attached to Mrs. Phelps' deposition.

67 (Defendant objected that it was incompetent and immaterial; which objection was overruled by the court, and defendant's counsel then and there duly excepted.)

The press copy was in words and figures the same as, and a fac-simile of, Plaintiffs' Ex. 1 hereto annexed.

Plaintiffs counsel then called FRANK DUNPHY as a witness, who, being duly sworn, testified as follows:

That he was recording and releasing clerk in Cutler's office in New Orleans, in 1865; that about the 6th or 7th of June, 1865, he had some conversation with George L. Kouns, whom he knew in Mr. Cutler's office, relative to some cotton which had arrived at New Orleans at that time.

The following question' were then asked:

Q. Now state what the conversation was about this.

(Defendant's counsel objected on the ground that defendant
68 would not be bound by their conversation; which objection was overruled by the court, and defendant's counsel then and there duly excepted.)

Witness, answering, then said that Mr. Kouns was very much incensed in relation to paying the tax of twenty-five per cent.; that Kouns asked him if there was no way to obtain the power to dispose of the cotton without paying the tax; that he told Kouns there was none, that it must be paid; that he, Kouns, said the act was unjust, and not right at all, and that he should protest against it; that witness told Kouns that he, witness, had nothing to do with protesting; that Kouns said he would find out the proper means and protest against the payment; that Kouns said it would be for his pecuniary advantage to pay in money rather than in kind.

Being cross-examined, the witness said that he was not authorized to deal with parties who came to deal with the office; that he told Kouns that he, witness, had nothing to do with protesting; that he said what he did to Kouns simply out of kindness.

69 (Defendant's counsel then moved to strike out the testimony of the conversation on the ground that the defendant could not be

bound by conversation between the plaintiff and a third party unless that third party was his agent in the matter; which motion was denied by the court, and defendant's counsel then and there duly excepted.)

Witness, proceeding, then said that it was not an infrequent thing for parties to protest verbally; that he had heard them do it pretty emphatically.

The foregoing is, in substance, all the evidence put in by both sides.

Defendant's counsel then moved to strike out the so-called protest, Plaintiffs' Ex. I, on the ground that there was no evidence that it
70 was received by the defendant in this case before he covered the money into the Treasury.

(This motion was denied by the court; and defendant's counsel then and there duly excepted.)

Defendant's counsel then moved that the court direct a verdict for the defendant on the ground that on the undisputed evidence the case falls under the provisions of sec. 7 of the act of March 3, 1863, twelve Statutes at Large, 757, and action was not commenced within two years as there provided.

(This motion was denied by the court; and defendant's counsel then and there duly excepted.)

Defendant's counsel then moved that the court direct a verdict
71 for the defendant on the ground that this case, as developed by the evidence, is within the exclusive jurisdiction of the Court of Claims.

(This motion was denied by the court; and defendant's counsel then and there duly excepted.)

Defendant's counsel then moved that the court direct a verdict for the defendant on the ground that the taking of the money in this case was lawful, the cotton having come from the west bank of the Mississippi River, and not being affected by the proclamation of June 13th, 1865.

(This motion was overruled by the court; and defendant's counsel then and there duly excepted.)

The court then charged the jury that as to the $13,695.92 paid on the T. S. Conlay cotton, on June 12th, 1865, there could be no recovery.

(To which plaintiffs' counsel then and there duly excepted.)

The court further charged, among other things, as follows:

"But, gentlemen, on the 13th day of June, 1865, the President of
72 United States issued a proclamation which had a very important bearing upon the rights of the parties to this action. By that proclamation all restrictions upon trade east of the Mississippi River were removed, and all restrictions upon the removal of products, according to my construction of it, then being on the east of the Mississippi were also annulled. That being so, the cotton of these plaintiffs in the city of New Orleans on the 13th, being of course east of the Mississippi River was relieved from the payment of any tax or bonus upon it."

(To this part of the charge defendant's counsel then and there duly excepted.)

The court furtlier charged, among other things, as follows:

"That if the jury found that the money paid for which the action was brought was the money of the plaintiffs, and that the defendant had notice before July 12th, 1865, from the plaintiffs or somebody representing them

that the legality of his exaction of this bonus or tax was contested, the plaintiffs were entitled to recover as to the payments made after
73 June 13th, 1865, to wit: the payment of $7,200.00 on the 15th day of June, and the payment on the 20th day of June of $8,588.41."

(To this part of the charge of the court defendant's counsel then and there duly excepted.)

The court further charged:

"The jury are to distinguish between the notice conveyed to the defendant himself and notice given to somebody in his office. He is chargeable with such notice as he received, or with such notice given to his subordinates as it was in the line of their duty to receive and communicate to him, but he is not chargeable simply because notice may have been given to a subordinate who had no authority to treat with the plaintiffs upon matters of this kind, and who did not inform the defendant of the fact."

74 And with reference to the written protest the court further charged:

"Now, you will remember Mr. Cutler testifies that the notice of this proclamation was received in New Orleans on the 16th, and you, probably, when you recall the fact that this protest bears date upon the 19th, will come to the conclusion that the real ground of protest in this case was one which occurred to the parties after the 16th day of June, when they found that by proclamation dated the 13th this defendant had no longer any right to exact a bonus or a tax upon cotton then in the city of New Orleans. It was very natural that they should attempt to put themselves in a position to reclaim what they had paid after that date. Now, gentlemen,
75 you may find that there was never any verbal notice, or at least any notice on the part of the plaintiffs which reached the defendant, but you may come to the conclusion that this protest which bears date upon the 19th (which appears in the copy-book of Phelps & Co., made in the usual course of business, as of that date, one similar to which was afterward found on the files of the Treasury Department in Washington) was really served upon this defendant about the time of its date. If you come to that conclusion, gentlemen, the plaintiff is entitled to recover.

"Now, I shall not recall the testimony in regard to that protest. I leave it for you to say whether that was sent by Phelps & Co. and received by the defendant about the time when it bears date, or prior to the
76 12th of July, when the defendant testifies he covered the money into the Treasury. If it was, and you find the other issues in favor of the plaintiffs, the plaintiffs are entitled to recover as to the payments made after the 13th day of June, to wit, the payment of $7,200.00 on the 15th of June, and the payment on the 20th of June of $8,588.41."

Plaintiffs' counsel then requested the court to charge the jury that the plaintiffs were entitled to recover back the money which they involuntarily paid for the release of their cotton on the 12th of June, 1865, as well as that paid after June 13th, 1865.

(The court refused so to charge, and to such refusal plaintiffs' counsel then and there duly excepted.)

77 Plaintiffs' counsel then requested the court to charge the jury that the rate of interest recoverable in this action on the money in question was seven per cent. up to the first day of January, 1880.

(The court refused so to charge, and plaintiffs' counsel thereupon duly excepted to such refusal.)

The counsel for the parties having agreed that the items of $7,200.00 and $8,588.41 with interest at six per cent. amounted to $29,679.55, the jury then found a verdict for the plaintiffs in that amount.

And inasmuch as the foregoing proceedings do not appear in the record, and inasmuch as the defendant by his counsel has prayed that the foregoing exceptions of the defendant, and the plaintiffs by their counsel that the foregoing exceptions of the plaintiffs, may be signed and sealed and made a part of the record, this bill of exceptions is allowed by the court
78 and directed to be filed as a part of the record as of the 17th day of February, 1880, before the jury left the bar.

WM. J. WALLACE,
District Judge.

79 PLAINTIFFS' EXHIBIT A.

H'DQ'RS NORTHERN DIV. OF LOUISIANA,
Alexandria, La., June 4th, 1865.

Permission is given the steamboat New Era, loaded with cotton belonging to citizens, to pass out of Red River and proceed to New Orleans, in accordance with General Order No. 3, H'dquar. Mil. Div. of the Southwest. Naval officers at mouth of Red River will permit this boat to pass.

F. J. HERRON, *Maj. Gen'l.*

80 PLANTIFFS' EXHIBIT B.

[General Orders No. 3.]

HEADQUARTERS MILITARY DIVISION OF THE SOUTHWEST,
New Orleans, La., June 1st, 1865.

In order to facilitate the shipment of cotton from Louisiana and Texas, all commanding officers in Texas and in Louisiana west of the Mississippi River are hereby notified that there must be no military interference to its coming out of the country. Such confederate cotton as comes into their possession will be turned over to the agents of the Treasury Department for the special purpose of looking up confederate cotton; however, commanding officers are not authorized to employ military authority in any way that might embarras' the public service or impede the shipment of cotton in private hands.

By command of Major General P. H. Sheridan.

F. C. NEWHALL,
Ass't Adjutant General.

Official.

81 UNITED STATES OF AMERICA:

WAR DEPARTMENT,
Washington City, May 25th, 1875.

Pursuant to the act of Congress of the 22d February, 1849, I, William W. Belknap, Secretary of War, do hereby certify that the annexed is a

true copy of General Order No. 3, Headquarters Military Division of the Southwest, dated June 1st, 1865, as shown by records on file in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed on the day and year first above written.

[L. S.] WM. W. BELKNAP,
Secretary of War.

82 PLAINTIFFS' EXHIBIT C.

No. 6.] NEW ORLEANS, *June 12th*, 1865.

Pike, Lapeyne & Brother, banking-house, Camp street, between Canal and Common sts., pay to O. W. Cutler, Treasury agent, or order, thirteen thousand six hundred ninety-five $\frac{92}{100}$ dollars.

$13,695.92.] HARLOW J. PHELPS & CO.

[U. S. int. rev. 2. 2. Bank check. June 12. H. J. P. & Co.]

(Across the face:) Good. P. L. B.

(Endorsed:) O. N. Cutler. First National Bank of New Orleans.

83 PLAINTIFFS' EXHIBIT D.

No. 17.] NEW ORLEANS, *June 15th*, 1865.

Pike, Lapeyne & Brother, banking-house, Camp street, between Canal and Common sts, pay to O. N. Cutler, or order, seven thousand two hundred dollars.

[$7,200.00.] HARLOW J. PHELPS & CO.

[U. S. int. rev. 2. 2. Bank check. June 15, 1865. H. J. P. & Co.

(Across the face:) Good. P. L. B.

(Endorsed:) O. N. Cutler. First National Bank of New Orleans.

84 PLAINTIFFS' EXHIBIT E.

No. 51.] NEW ORLEANS, *June*, 20, 1865.

Pike, Lapeyne & Brother, banking-house, Camp street, between Canal and Common streets, pay to O. N. Cutler, esq., or order, eight thousand five hundred and eighty-eight $\frac{41}{100}$ dollars.

[$8,588.41.] HARLOW J. PHELPS & CO.

[U. S. int. rev. 2. 2. Bank check. June 19, 1865. J. J. P. & Co.]

(Across the face:) Good. P. L. B.

(Endorsed:) O. N. Cutler. First National Bank of New Orleans.

85 PLAINTIFFS' EXHIBIT F.

Sales by Harlow J. Phelps & Co., 142 Gravier st., of five hundred and twenty-eight bales of cotton, per st'r New Era, for ⅔ of George L. Kouns & Bros.

190 b. c. w'h'g 87,108 lbs., *@* 30c	$26,132	40
149 b. c. w'h'g 66,025 " " 30c	19,807	50

87 b. c. w'h'g 37,141 " " 29c		10,770 89
41 b. c. w'h'g 17,965 " " 29c		5,209 85
34 b. c. w'h'g 15,565 " " 26½c		4,124 72
*6 b. c. w'h'g 2,415 " " 20c		483 00
†21 b. c. w'h'g 8,000 " " 11½c		920 00
(528) Five hundred & twenty-eight bales cotton		$67,448 36
		67,448 36

CHARGES.

Paid Gov't tax ¼ $16,395.33; A. B. Seelyer, bill for picking charges, $880.92; brokerage @ ¼, $168.62	$17,444 87	
Insurance $505.86; int. rev. 84.31; w'h'g, cleaning, marking free, $264; private w'h'g, drayage & storage $264	1,118 17	
Bagging, rope, and labor for repairing cotton in press $150.55; ranging selection, $26.40	176 95	
Commissions	3,372 41	
		$22,112 40
Net proceeds		$45,335 96

86 E. E.
New Orleans, June 24th, 1865.
HARLOW J. PHELPS & CO.,
Per EDGAR NOTT.

87 PLAINTIFFS' EXHIBIT G.

Sales by Harlow J. Phelps & Co., 142 Gravier st., of twenty-one (21) *bales cotton, per steamer New Era, for % of Geo. L. Kouns & Bro.*

21 ⟨2⟩ bales cotton, weighing 9,315 pounds		2,682 60

CHARGES.

Paid gov't tax ¼, $595.15; A. B. Seeley's bill for picking charges, $35.03; brokerage, $6.70; insurance, $20.11; inte'n'l rev., $3.35; w'h'g, cleaning, and marking free, $11.50; private w'h'g, drayage, & storage, $11.50; ranging selections, $1.15; bagging, rope, & labor for repairing cotton in press, $5.98	690 47	
Commissions	13 41	
		$703 88
Net proceeds		$1,978 72

E. E.
New Orleans, June 24th, 1865.
HARLOW J. PHELPS & CO.,
Per EDGAR NOTT.

* Rejection. † Pickings.

88 PLAINTIFFS' EXHIBIT H.

350 bales, weighing 158,590, @ 35c..... $55,506 50

CHARGES.

Paid the government tax as per bill.....	$16,695 32
" fire insurance, $138.76; tarpaulin, $10.00.....	148 76
" weighing and classing, $157.50; marking free, $17.50..	175 00
" internal revenue, $69.56; broker, $1.38.....	208 14
" commissions on sales at 2½ %.....	1,387 65
" picking c'arges on 350 bales.....	337 00
Including drayage, storage on whole.....	15,952 47
	$39,554 03

E. & O. E.

New Orleans, June 13th, 1865.

HARLOW J. PHELPS & CO.,
Per J. T. DIBOL.

Attest:
EDGAR NOTT.
R. J. WINGATE.

89 PLAINTIFFS' EXHIBIT I.

OFFICE OF HARLOW J. PHELPS & CO.,
142 *Gravier st., New Orleans, June 19th*, 1865.

O. N. CUTLER, Esq.,
Agent U. S. Treasury Department:

SIR:

On the 12th inst. we paid you as per custom-house invoices..		$13,695 92
15. On	" "	7,200 00
19. And to-day we pay.....		8,588 41
		$29,484 33

Being 25 % per cent. on cotton shipped us by S. B. New Era & T. S. Conlay.

We are requested by the consignor and owner of said cotton to protest against the payment of said tax, and do by these writings protest in the names of John C. Murphy, G. L. Kouns & Bros., H. J. Phelps, for what has already been paid, and against what we pay you this day, and any amount we may be called upon to pay you as (25 %) twenty-five per cent. tax on cotton coming and on hand from the east or west bank of the Mississippi River consigned to our firm, as we hope and will make the
90 effort to have this tax remitted through the prescribed or proper channel.

With great respect, we are your ob't serv'ts,

HARLOW J. PHELPS & CO.

91 DEFENDANT'S EXHIBIT 1.

Manifest of st'r New Era, from Shreveport to New Orleans, G. L. Kouns, master, June 7th, 1865.

H. J. Phelps & Co.:

500 bales cotton. B
21 do. do. L
23 do. do. MR.
1 do. do. MR.
Sundries to order.

I, Geo. L. Kouns, do solemnly swear in presence of Almighty God that I will henceforth faithfully support, protect, and defend the Constitution of the United States and all laws made in pursuance thereto.

Sworn before me June 7, '65.

W. C. GRAY,
Dep. Collector.

92 CUSTOM-HOUSE, PERMIT OFFICE.

Personally appeared before, me W. C. Gray, George L. Kouns, master of st'r New Era, from Shreveport, and made oath that the annexed manifest is true in every particular.

G. L. KOUNS.

Sworn this 7th day of June, 1865.

Deputy Collector.

E. S. H.

93 DEFENDANT'S EXHIBIT 2.

Manifest of st'r T. L. Conlay, from Jefferson to New Orleans.

H. J. Phelps & Co., Jefferson—New Orleans:
350 b. c., various.

NOAH SEWELL, *Master.*

I, George L. Kouns, do solemnly swear in presence of Almighty God that I will henceforth faithfully support, protect, and defend the Constitution of the United States and all laws made in pursuance thereto.

G. L. KOUNS.

Sworn before me June 7, '65.

W. C. GRAY,
Dep't. Collector.

94 CUSTOM-HOUSE, PERMIT OFFICE.

Personally appeared before me, W. C. Gray, Geo. L. Kouns, master of st'r T. S. Conlay, from Jefferson, Texas, and made oath that the annexed manifest is true in every particular.

G. L. KOUNS.

Sworn this 7th day of June, 1865.

W. C. GRAY,
Deputy Collector.

E. J. H.

95 DEFENDANT'S EXHIBIT 3.

Form 4.] TREASURY DEPARTMENT,
OFFICE OF PURCHASING AGENT,
New Orleans, June 14th, 1865.

O. N. Cutler, purchasing agent, bought of H. J. Phelps & Co.:

Lot.	Marks.	Quantity.	Classification.	Weight.	Price per lb.
138	Various...	550 bales cotton...	Ordinary..	N. Y. 239,091	26c. 19½

Amount, $46,622.75.
Resold.
Received payment.

HARLOW J. PHELPS & CO.

(Endorsed:) Dx. Lot No. 138. Invoice. H. J. Phelps & Co. 550 bales cotton. June 14th, 1865. St'r New Era. June 7th. Indepen't Press.

96 DEFENDANT'S EXHIBIT 4.

Form 5.] TREASURY DEPARTMENT,
OFFICE OF PURCHASING AGENT,
New Orleans, June 14, 1865.

H. J. Phelps & Co., bought of O. N. Cutler, purchasing agent:

Lot.	Marks.	Quantity.	Classification.	Weight.	Price per lb.	Amount.
138	Various...	550 bales cotton...	Ordinary..	239,091	26c.	$62,163 66

Resold.

I hereby certify that the above invoice of cotton is free from all fees and internal-revenue taxes.

Purchasing Agent.

62,163 66
46,622 75

$15,540 91
247 50

$15,788 41

(Endorsed:) Dx. Lot 138. Bills of sale. H. J. Phelps & Co. 550 bales cotton. June 14, 1865.

97 DEFENDANT'S EXHIBIT 5.

Form 4.] TREASURY DEPARTMENT,
OFFICE OF PURCHASING AGENT,
New Orleans, June 9th, 1865.

O. N. Cutler, purchasing agent, bought of H. J. Phelps & Co.

Lot.	Marks.	Quantity.	Classification.	Weight.	Price. per lb.	Amount.
75.....	Various...	352 bales cotton...	Good ordinary..	N. Y. 159,265	34c. 25½c	$40,612 58

Resold.
Received payment.

HARLOW J. PHELPS & CO.

(Endorsed:) Lot No. 75. Invoice. H. J. Phelps & Co. 352 bales cotton. June 9, 1865. T. S. Conlay. June 7. Merchants' press.

98 DEFENDANT'S EXHIBIT 6.

Form 5.] TREASURY DEPARTMENT,
OFFICE OF PURCHASING AGENT,
New Orleans, June 9, 1865.

H. J. Phelps & Co., bought of O. N. Cutler, purchasing agent.

Lot.	Marks.	Quantity.	Classification.	Weight.	Price. per lb.	Amount.
75.....	Various...	352 bales cotton...	Good ordinary..	159,265	34c.	$54,150 10

54,150 10
40,612 58

13,537 52
158 40

13,695 92

I hereby certify that the above invoice of cotton is free from all feess and internal revenue taxes.

Purchasing Agent.

(Endorsed:) Lot No. 75. Bill of sale. H. J. Phelps & Co. 352 bales cotton. June 9, 1865.

99 DEFENDANT'S EXHIBIT 7.

DEPARTMENT OF THE GULF,
U. S. MILITARY TELEGRAPH OFFICE,
June 16th, 1865.

By telegraph from Washington on 15th, 6.30 p. m.

To L. S. CUTLER, *U. S. P. Agent:*

The twenty-five cents to Gov't on cotton east of Miss., removed by proclamation, revoked.

Everything done in relation since the 13th, and confine your operations hereafter to west side.

HUGH McCULLOUGH,
Sec'y Treasury.

32p.

100 DEFENDANT'S EXHIBIT 8.

TREASURY DEPARTMENT,
November 16th, 1865.

WM. S. DEZENG, Esq., *Washington, D. C.:*

SIR: Your letter of August 3d last, enclosing a protest by Messrs. Harlow J. Phelps & Co., of New Orleans, against the payment of the 25 per cent. Government share collected by U. S. Purchasing Agent O. N. Cutler on shipment of cotton from the western side of the Mississippi River prior to June 24th last, was considered at the time, but the ground of protest not being stated, and Mr. Cutler's actions appearing to accord with the law and Treasury regulations, the papers were referred to him for explanation and report. Owing to his absence in connection with his duties under a new appointment his reply has been delayed.

He now states that he knows no grounds on which a reclamation of the amount so collected can be barred, a statement in accordance with the view taken of the case at first by the Department.

Respectfully,

H. McCULLOGH,
Sec'y of the Treasury.

101 DEFENDANT'S EXHIBIT 9.

WASHINGTON (249 F. st.),
August 3, 1865.

Hon. H. McCULLOGH,
Sec'y of the Treasury:

SIR: I beg leave to present the enclosed paper relating to a claim made by Messrs. Harlow J. Phelps & Co., of New Orleans, for the return of a considerable amount of money paid by them under protests to O. N. Cutler, esq., U. S. Treasury agent at that city.

I am, with high regard, your very ob't servant,

WM. S. DEZENG.

102 DEFENDANT'S EXHIBIT 10.

Amended regulations for the purchase of products of the insurrectionary States on Government account.

TREASURY DEPARTMENT,
May 9th, 1865.

1. Agents shall be appointed by the Secretary of the Treasury, with the approval of the President, to purchase for the United States, under special instructions from the Secretary of the Treasury, products of States declared to be in insurrection, at such places as may from to time be designated by the Secretary of the Treasury as markets or places of purchase. Agents heretofore appointed for the places designated under previous

regulations will continue their agencies as if appointed under the regulations.

2d. Before entering upon the discharge of his duty each of the agents so appointed shall execute a bond with sureties in the prescribed form, in a penal sum to be fixed by the Secretary of the Treasury, condi-
103 tioned for the faithful discharge of his duty, and that he shall not engage, directly or indirectly, in the purchase of products on private account, nor be in any way interested in the products purchased by him, or the proceeds or profits arising therefrom.

3d. The operation of purchasing agents shall be confined to the single article of cotton, and they shall give public notice, at the place to which they may be assigned, that they will purchase, in accordance with these regulations, all cotton not captured or abandoned which may be brought to them.

4th. To meet the requirements of the 8th section of the act of July 2d, 1864, the agents shall receive all cotton so brought and forthwith return to the seller three-fourths thereof, which portion shall be an average grade of the whole according to the certificate of a sworn expert or sampler.

5th. All cotton purchased and resold by purchasing agents shall be exempt from all fees and all internal taxes, and the agent selling shall mark the same "free," and furnish to the purchaser a bill of sale
104 clearly and accurately describing the character and quantity sold, and containing a certificate that it is exempt from taxes and fees as above.

6th. Purchasing agents shall keep a full and accurate record of all their transactions, including the names of all persons from whom they make purchases, the date of purchase, a description of the cotton purchased by them, and the quantity and quality thereof; also of the one-quarter retained by them. A transcript of this record will be transmitted to the Secretary of the Treasury on the first day of each month.

7th. Sales of the cotton retained by the purchasing agents under Regulation IV, or the difference between three-fourths the market price and the full price thereof in the city of New York, may be made by such agents at such places and times and in such manner as may be directed in special instructions from the Secretary of the Treasury. When such sales are not so authorized the agents shall without delay ship it to New York on the best terms possible, consigned, until otherwise directed, to
105 S. Draper, cotton agent and disbursing officer, at that place. Bills of lading in triplicate for such shipments must be taken, one of which shall be sent to the agent at New York, one to the Secretary of the Treasury, and one retained by the purchasing agent.

8th. Prior to the close of each month, and in sufficient time for the necessary action, the purchasing agent shall prepare and forward to the commissioner of customs a full estimate of the probable expenses of his office for the month next ensuing, the amount of which, together with any sum found due from inadequacy of former estimates, or less so much as may remain unexpended from any amount previously sent, will be transmitted to said purchasing agent. Purchasing agents will require receipts in triplicate for all moneys paid by them, one of which receipts shall be forwarded to the disbursing officer, one to the First Auditor of the Treasury with his accounts, and one retained by the agent.

9th. All agents are prohibited from purchasing any products of an insurrectionary State which shall have been captured by the military
106 or naval forces of the United States or which shall have been abandoned by the lawful owner thereof.

10th. These regulations, which are intended to revoke and annul all others on the subject heretofore made, will take effect and be in force on and after May 10th, 1865.

HUGH McCULLOGH,
Secretary of the Treasury.

EXECUTIVE CHAMBER,
Washington City, May 9, 1865.

Approved.

ANDREW JOHNSON.

107 DEFENDANT'S EXHIBIT 11.

Executive order relative to the purchase of products of insurrectionary States.

EXECUTIVE MANSION, *September* 24, 1864.

1. Congress having authorized the purchase for the United States of the products of States declared in insurrection, and the Secretary of the Treasury having designated New Orleans, Memphis, Nashville, Pensacola, Port Royal, Beaufort, N. C., and Norfolk as places of purchase, and, with my approval, appointed agents and made regulations under which said products may be purchased: Therefore,

2d. All persons except such as may be in the civil, military, or naval service of the Government having in their possession any products of States declared in insurrection which said agents are authorized to purchase, and all persons owning or controlling said such products therein, are authorized to convey such products to either of the places which have been hereby, or may hereafter be, designated as places of purchase, and such products so destined shall not be liable to detention, seizure, or
108 forfeiture while in transitu or in store awaiting transportation.

3rd. Any person having the certificate of a purchasing agent as prescribed by Treasury Regulations VIII, is authorized to pass with the necessary means of transportation to the points named in said certificate, and to return therefrom with the products required for the fulfillment of the stipulations set forth in said certificate.

4th. Any person having sold and delivered to a purchasing agent any products of an insurrectionary State, in accordance with the regulations in relation thereto, and having in his possession a certificate setting forth the fact of such purchase and sale, the character and quantity of products, and the aggregate amounts paid therefor as prescribed by Regulation IX, shall be permitted by the military authority commanding at the place of sale to purchase from any authorized dealer at such place or any other place in a loyal State, merchandise and other articles not contraband of war, now prohibited by the order of the War Department, nor coin, bullion, or foreign exchange, to an amount not exceeding in value one-third of the aggregate value of the products sold by him as certified by the agent
109 purchasing; and the merchandise and other articles so purchased

may be transported by the same route, and to the same place, from and by which the products sold and delivered reached the purchasing agent, as set forth in the certificate; and such merchandise and other articles shall have safe conduct, and shall not be subject to detention, seizure, or forfeiture while being transported to the places and by the route set forth in the said certificate.

5th. Generals commanding military districts, and commandants of military ports and detachments, and officers commanding fleets, flotillas, and gun-boats, will give safe conduct to persons and products, merchandize, and other articles duly authorized as aforesaid, and not contraband of war, or prohibited by order of the War Department or the orders of such generals commanding, or other duly authorized military or naval officer made in pursuance thereof; and all persons hindering or preventing such safe conduct of persons or property will be deemed guilty of a military offense and punished accordingly.

6th. Any person transporting or attempting to transport any
110 merchandise or other articles, except in pursuance of regulations of the Secretary of the Treasury, dated July 29, 1864, or in pursuance of this order, or transporting, or attempting to transport, any merchandise or other articles contraband of war, or forbidden by any order of the War Department, will be deemed guilty of a military offense and punished accordingly; and all products of insurrectionary States found in transitu to any other person or place than a purchasing agent, and a designated place of purchase, shall be seized and forfeited to the United States, except such as may be moving to a loyal State under duly authorized permits of a proper officer of the Treasury Department, as prescribed by Regulation XXXVIII concerning "commercial intercourse," dated July 29, 1864, or such as may have been found abandoned, or have been captured and are moving in pursuance of the act of March 12, 1863.

7th. No military or naval officer of the United States or person in the military or naval service, nor any civil officer except such as are appointed for that purpose, shall engage in trade or traffic in the products of insurrectionary States, or furnish transportation therefor, under pain
111 of being deemed guilty of unlawful trading with the enemy and punished accordingly.

8th. The Secretary of War will make such general orders or regulations as will insure the proper observance and execution of this order; and the Secretary of the Navy will give instructions to officers commanding flotillas and gun-boats in conformity therewith.

ABRAHAM LINCOLN.

112 DEFENDANT'S EXHIBIT 12.

Agents for the purchase of products of insurrectionary States on Government account will close their official business east of the Mississippi, with the transactions of the 13th instant, and west of it with the transactions of the 24th instant; returning to sellers all property or money received or collected since those dates respectively, and using such despatch in the premises that their connection with the Department may if possible terminate with the 30th instant.

113 (Indorsed:) U. S. circuit court, so. dist. of N. Y. Geo. L.

Kouns and John Kouns vs. Otis N. Cutler. Bill of exceptions. Stewart L. Woodford, U. S. att'y. 18' May, 1880. Correctly engrossed in accordance with the proposed bill and amendments as settled. U. S. circuit court. Filed May 21, 1880. John I. Davenport, clerk. pl'ffs' att'y, Stewart L. Woodford, U. S. att'y for def't.

114 *Assignment of errors.*

Supreme Court of the United States.

OTIS N. CUTLER, PLAINTIFF IN ERROR,
against
GEO. L. KOUNS ET AL., DEFENDANTS IN ERROR.

Of the term beginning on the second Monday of October, 1880.

Afterwards, to wit, on the second Monday of October in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, District of Columbia, come the said plaintiff in error, by Stewart L. Woodford, U. S. attorney, and says that in the record and proceedings aforesaid and also in the rendition of judgment aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid
115 given, was given for the defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said Otis N. Cutler against the said Geo. L. Kouns et al.

And this he, the said Otis N. Cutler, plaintiff in error, is ready to verify.

Wherefore he, the said plaintiff in error, prays that the judgment aforesaid may, for the errors in the record and proceedings appearing, be revoked, annulled, and altogether held for nothing, and that the said plaintiff in error may be restored to all things which he has lost by occasion of said judgment, &c.

STEWART L. WOODFORD,
U. S. Attorney.

(Endorsed:) U. S. Supreme Court, southern district of New York. Otis N. Cutler, pl'ff in error, versus Geo. L. Kouns et al., deft's
116 in error. Stewart L. Woodford, United States Attorney.

Due service of a copy of the within is hereby admitted Sept. 29, 1880.

JEFFERSON CLARK,
Pl'ff's. Att'y.

U. S. Circuit court. Filed Sept. 30, 1880, John I. Davenport, clerk.

117 UNITED STATES OF AMERICA, *ss:*

To Geo. L. Kouns et al., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty, pursuant to a writ of

error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Otis N. Cutler is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 24th, 1880. SAM'L BLATCHFORD.

118 (Indorsed:) U. S. Supreme Court. Otis N. Cutler, plaintiff in error, against Geo. L. Kouns et al., defendants in error. Citation. U. S. circuit court. Filed Sep. 24, 1880. John I. Davenport, clerk.

Due service of a copy of the within is hereby admitted.

JEFFERSON CLARK,
Att'y for def'ts in Error.

NEW YORK, *Sept.* 24, 1880.

(Indorsement on cover:) No. 187. Otis N. Cutler, plaintiff in error, vs. George L. Kouns and John Kouns. S. New York C. C. U. S. Filed 28th October, 1880.

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110-720.

OFFICE SUPREME COURT U. S.
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JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

CUTLER
vs.
KOUNS, &c. } No. 187.

BRIEF FOR THE PLAINTIFF IN ERROR.

thorized by section 8 of the act of July 2, 1864, and the regulations issued in that connection.

Upon the trial below the counsel for Cutler moved the court to direct a verdict for him, upon the ground that the case fell under the provisions of section 7 of the act of March 3, 1863 (12 Stat., 757), this action having not been commenced *within two years*, as therein provided. This motion was denied by the court. Counsel then moved the court to direct a verdict for Cutler upon the further ground that the taking was lawful, *the cotton having come from* WEST *of the Mississippi River, and therefore not being affected by the proclamation of June* 13, 1865.

The court, amongst other things, charged as follows: (Record, p. 23.)

> Upon the 13th of June, 1865, the President of the United States issued a proclamation which had a very important bearing on the rights of the parties to this action. By that proclamation all restrictions upon trade east of the Mississippi River were removed, and all restrictions upon the removal of products, according to my construction of it, then being on the east of the Mississippi, were also annulled. That being so, the cotton of Kouns & Co., in the city of New Orleans on the 13th, being of course east of the Mississippi River, was relieved from the payment of any tax or bonus upon it.

The court further charged as follows (Record p. 23):

> That if the jury found that the money for which the action was brought, was the money of Kouns &

> Co., and that Cutler had notice before July 12, 1865, from them, or somebody representing them, that the legality of his exaction of this bonus or tax was contested, they were entitled to recover as to the payments made after June 13, 1865, to wit, the payment of $7,200 on the 15th day of June, and the payment on the 20th day of June of $8,588.41.

To these denials and instructions the counsel for Cutler then and there duly excepted. In accordance with the charge there was a verdict amounting to $29,679.55.

The duties of purchasing agents will be found stated in a Treasury circular, upon folio 102, &c., of the Record.

The material part of the proclamation of June 13, 1865, is as follows:

> Now, therefore, be it known that I, Andrew Johnson, President of the United States, do hereby declare that all restrictions upon the internal, domestic, and coastwise intercourse and trade, and upon the removal of products of States heretofore declared in insurrection, reserving and excepting only those relating to contraband of war as hereinafter recited, and also those which relate to the reservation of the rights of the United States to property purchased in the territory of an enemy, heretofore imposed in the territory of the United States east of the Mississippi River, are annulled, and I do hereby direct that they be forthwith removed. (13 Stat., 763.)

Upon the 24th of June, 1865, a proclamation was issued which, after reciting, "Whereas it now seems expedient and proper to remove restrictions upon internal, domestic, and coastwise trade and commercial intercourse between and within the States and Territories west of the Mississippi River," proceeded as follows:

> Now therefore, be it known that I, Andrew Johnson, President of the United States, do hereby declare that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the purchase and removal of products of States and parts of States and Territories heretofore declared in insurrection lying west of the Mississippi (except only, &c.), are annulled; and I do hereby direct that they be forthwith removed." (13 Stat., 769.)

It will be recollected that in United States *vs.* Norton (97 U. S., 164), it is decided that the proclamation of June 13, 1865, took effect *as of the beginning of that day.*

I submit as *error:*

1. His honor's refusal to instruct the jury that the suit was barred because not brought within two years from the time that the cotton was seized.

2. The instruction that the cotton was freed from restrictions by virtue of the proclamation of June 13, 1865, because at that time found within New Orleans.

1. The act of Cutler, from the point of view upon which this suit is sought to be, and can alone be maintained, was *a wrong done during the rebellion under color of an authority exercised under the President of the United States*, and therefore this suit could not be brought after two years from the time at which such wrong was done.

This defense is set up under the act of 1863, ch. 81, sec. 7 (12 Stat., 757), which is as follows:

> SEC. 7. That no prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed, or act may have been omitted to be done: *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall by virtue of this act be debarred of his remedy by suit or prosecution until two years from and after the passage of this act.

It is submitted in this connection that it was plainly a purpose of Congress to put an early end to suits for trespasses done by officers of the Government during the rebellion under color of law or of high executive authority; and that however questionable in point of constitutional power some of these statutes in this connection may have

been, it was entirely competent to render such suits subject to a *short* statute of limitations as above. This probably will not be denied. It seems as little doubtful, upon a broad view of the general policy of the Government, that such suits as the present are within the statute just quoted; and that it was intended that *plaintiffs* after the limited two years should try their complaints *in the Court of Claims*, as often they seem to have done. See Norton's case (above) and the *note* thereto.

See, in this connection, also, the statute of 1868, chapter 246, section 3 (15 Stat., 243), together with that of 1864, chapter 225, section 8 (13 Stat., 377), which authorized the appointment of *purchasing agents*, and which is referred to in the act of 1868.

It will be noticed that the statute of 1863 includes acts done *under color*, &c. It is submitted that although the proclamation of June 13 went into effect upon the morning of that day, yet, under the circumstances of its want of publication in New Orleans or knowledge by Cutler until *th* 16*th*, all previous action by him under former orders by the President, &c., was *under color*. This would exclude from the verdict the second item of payment above, that, to wit, upon the 15th, *because not sued for within two years*, &c.

2. The case is one affecting certain products of the territory WEST of the Mississippi that, on the 6th of June, 1865, had been allowed to come to New Orleans under the trade restrictions upon that day existing betwixt that city and the places of production. Whilst there, a certain *trade* there-

abouts betwixt the owners and the purchasing agent being still incomplete, a proclamation (June 13) removed the *restrictions* betwixt the city and places EAST of the Mississippi, and "upon all removal of products of States * * * EAST of the Mississippi," the *restrictions* betwixt the city and places WEST of the Mississippi and upon the removal of their products not having been done away with until the 24th of June.

I submit that upon this showing it is evident that the *restrictions* in question applied to the cotton until June 24; for—

(*a.*) The proclamation of June 13 applied only to *products* of the country east of the Mississippi:

(*b.*) It would have been a fraud upon the President's policy, *i. e.*, a policy NOT *to remove these restrictions upon products of the country* WEST *of the Mississippi until June* 24, if it were held that by a removal thereof to a place EAST of the Mississippi under provisions of law which allowed of this in favor of purchasing agents of the Treasury, such products thereupon became so mingled with other products of the EAST as to be entitled to the benefits of the proclamation of June 13:

(*c.*) In any case, within the meaning of the proclamation of June 13, New Orleans was not a place EAST of the Mississippi, although so geographically; for what is spoken of in the proclamation as places EAST and WEST are places *a quo* the products were to be allowed to go, and places IN REBELLION; whilst New Orleans, a loyal

territory, was a place *ad quem*. If the mere being found in New Orleans upon the 13th of June, 1865, was enough to free the cotton from restriction, as being *then* EAST of the river, an argument *a fortiori* will show that the same location would have freed it in May or April, &c., previous, for the language of the restrictions never *expressly* applied to cotton *upon loyal ground*.

This will evince the fallacy of the position assumed in the construction alluded to in the former extract from the charge above given. For until the restrictions upon commercial dealing in products of the territory WEST of the Mississippi had been repealed, such products, if removed from their place of origin during such restrictions, would remain subject thereto, *no matter what might be the condition of commerce in products of the place to which they had been brought*. For all purposes of policy and of the war the former remained products of the WEST until the directions of that policy had been carried out as to them; *i. e.*, here by the execution of any unfinished negotiation with a *purchasing agent* up to the 24th of June, 1865, the date of the second proclamation above.

S. F. PHILLIPS,
Solicitor-General.

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110-720

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 187.

OTIS N. CUTLER, PLAINTIFF IN ERROR,

vs.

GEORGE L. KOUNS AND JOHN KOUNS.

BRIEF OF DEFENDANTS IN ERROR.

This case arises under the purchasing agency clause, Sec. 8, Act July 2, 1864. The defendant, Cutler, was such agent, and exacted from the plaintiffs the amount of the judgment in the Circuit Court (with interest, $29,679.55) on and after June 13, 1865, the date of the President's Proclamation removing all restrictions on trade east of the Mississippi river. The cotton upon which the tax was collected was on the east side of the Mississippi river on the morning of that day.

Said Proclamation took effect on the morning of the day of its date.

La Pegres' case, 17 Wall. 195.

Objection of defendants in Circuit Court (Record, pages 40, 41, original) to admission in evidence of Permit and General Order No. 3 (Plaintiff's Exhibit, A and B), were properly overruled. These documents are a part of the material history of the transaction and tend to show the legal status of the cotton at New Orleans.

Pages 42 and 43, Record—Conversation of plaintiff, Geo. L. Kouns, with clerks in Cutler's office, "apparently in charge," with whom he transacted the business, was admissible in evidence, subject to the proper protection of defendant in that behalf, in charge of judge to jury (Record, page 73), and defendant's objection was properly overruled.

Pages 51 and 52, Record—Question of plaintiff, "Was it customary to send all letters which were copied into this letter-book," was properly admitted in evidence against objection for immateriality. It was clearly competent to show custom and course of business.

Tattshall *vs.* Tarford, 3 Barn. and Adolph. 392.
Fitt *vs.* Fairchild, 3 Camp. 305.
Hogedarn *vs.* Reid, 3 Camp. 398.
Hetherington *vs.* Kemp, 4 Camp. 193.

Pages 54 and 55, Record—Objection of defendant to admission in evidence of protest (Plaintiff's Exhibit, I) was properly overruled. There clearly was sufficient evidence and ground by presumption for the jury to find that the protest found in the Treasury Department came there through the hands of the agent, Cutler, and that it was delivered to him in behalf of Kouns in timely season. The defendant was sufficiently protected by the judge in the charge to the jury (Record, 74, 75, 76).

Springfield *vs.* Harris, 107 Mass. 537.
Gibbon *vs.* Flatersloughough, 1 Starkie, 179.
Alvord and Baker *vs.* Cooper, 9 Wend. 323.
Shepherd *vs.* Currie, 1 Starkie, 369.
Brembridge *vs.* Osborne, 1 Starkie, 300.
Bowman *vs.* American Express Co. 21 Wis. 153.
King *vs.* Woodbridge, 21 Vt.
Lessee of Secard *vs.* Davis, 61 Pet. 124.
Hogedarn *vs.* Reid, 8 Camp. 379.

The motions denied by the Court (Record, 70, 71) involve all the remaining questions raised by the defense, and these questions are—

1. Does the case fall under Sec. 7, Act March 3, 1863, 12 Stats. 757?

2. Is the case exclusively within the jurisdiction of the Court of Claims?

3. Was the cotton, as coming from the west side of the Mississippi river, liable to the tax of 25 per cent.

FIRST.

Sec. 7, Act March 3, 1863, 12 Stats. 757, is as follows:

SECT. 7. *And be it further enacted*, That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any Act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or act may have been omitted to be done: *Provided*, That in no case shall the limitation herein provided commence to run until the passage of this Act, so that no party shall, by virtue of this Act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this Act.

The suits therein referred to are for arrests, imprisonments, and other causes—*ejusdam generis*. The case at bar is not one of that class.

This statute was held not to apply to the suit against a marshal, in McKey *vs.* Rains, 10 Wall. 25.

Same as to suit in ejectment, in Bigelow *vs.* Forest, 9 Wall. 348.

Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned.

Sedgwick on Construction of Statutes, 361.
Williams *vs.* Goulding, 1 Law Rep. C. P. 69.
Wheeler *vs.* McCormick, 8 Blatch. 276.
White *vs.* Ivey, 34 Geo. 186.
State *vs.* McGurry, 21 Wis. 496.
McIntyre *vs.* Ingraham, 35 Mass. 25.
State *vs.* Pemberton, 30 Mo. 376.
Bean *vs.* Beckwith, 18 Wall. 516.

Sec. 5 of said statute was held unconstitutional in Justices *vs.* Moss, 9 Wall. 274.

SECOND.

Is the matter exclusively in the Court of Claims? Certainly not, except by clear intention. Primarily, the citizen has his remedy in a common law court, with right of jury. This he has independent of statute.

Sec. 3, Act of July 27, 1868, referred to in defendant's answer, and the only law raised by the defense on this point, does not cover the case at bar. That section refers only to takers of captured and abandoned property, and provides that the particular remedy referred to in Sec. 3, Act of March 12, 1863, viz., that in the Court of Claims in favor of persons claiming to be the owner of any such abandoned or captured property, should be exclusive. The Government saw fit to hold the proceeds of the sale of abandoned or captured property as trustees for the rightful owner when one should present himself in her courts. This was a separate class of cases, entirely distinct from the present case. Agents were prohibited from purchasing captured or abandoned property. (Art. IX., Amended Regulations, May 9, 1865. Defendant's Exhibit, 10.)

Statutes are not to be construed as taking away a common law right unless the intention is manifest.

Maltby *vs.* Reab, 4 Mass. 473.
Salem Turnpike & Chelsea Bridge Corp. *vs.* Hayes, 5 Cush. 461.
Burden *vs.* Crocker, 10 Peck. 343.
Sedgwick on Const. Stats. 242.

The case at bar is like that of Hamilton *vs.* Dillon, 21 Wall. 95, which proceeded to judgment through the Circuit and Supreme Courts.

THIRD.

Was the cotton, being at New Orleans on the morning of June 13, 1865, legally liable to the tax? This involves a con-

sideration of the status of this particular part of the country at that time.

Prior to June 13, 1865, the status of all this territory was that of insurrection. It was so declared by Proclamation of the President, of August 16, 1861, made in pursuance with Act of July 3, 1861, by a Proclamation of April 2, 1863, (the latter merely bringing all parts of the insurgent States under the general licensing power of the President).

The Venice, 2 Wall. 278.
Hamilton *vs.* Dillon, 21 Wall. 95.

And by Proclamation of July 1, 1862, which declared the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Tennessee and Virginia, excepting certain counties, in insurrection.

By Act, March 12, 1863, Sec. 4, "All property coming to any of the United States not declared in insurrection, through or by any other person than a duly appointed agent," should be confiscated.

The entire State of Louisiana, in respect to shipment of cotton therefrom, remained under this commercial restriction until the Proclamation of June 13, 1865.

The said tax or bonus was imposed "upon the privilege of having cotton removed to a market."*

By the Proclamation of June 13, 1865, the status of a portion of the insurrectionary territory was changed, and that part which lay east of the Mississippi river became added to the loyal portion, and became a legitimate open market.

With said Proclamation, as respects commercial intercourse, the line of demarkation which had heretofore separated the

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*Quoting from Mr. Banfield, Solicitor of the Treasury, in his opinion in favor of the refunding of the tax in the case of Harlow J. Phelps & Co., with which claim this Kouns case was then joined, the opinion being copied in Rep. 18, H. R., 45th Congress, Committee on Claims, which report also recommended a refunding of the money collected from said Phelps & Co.

loyal or free market territory from the territory under the ban of prohibition, became shifted, and then came to be no longer on the northern line of Virginia and Tennessee, but along the line of the Mississippi river. Prior to this, no cotton, except upon payment of the prescribed tax, could come out of any of the insurrectionary territory into a loyal State; but, after June 13, 1865, though cotton could move freely from territory east, it was held that none could cross the river from the west, as in crossing this river it then came to a free market territory—the section west retaining its disability and the territory east becoming, by virtue of said Proclamation, commercially free.

The question as to the right of the plaintiff to recover under the rulings of the Circuit Court does not involve the alleged right of the Government to impose a tax on cotton which crossed the Mississippi river after the same was established by said Proclamation in respect to said commodity, as the dividing line between the prohibited insurrectionary and free market territory. Before this date, as respects the liability of cotton to the 25 per cent. tax, the line of the Mississippi river had no significance. Up to this time, there was no such expression known in the Laws, Proclamations or Regulations, as Eastern and Western Mississippi cotton. Certain privileges had been conceded to trade, and certain restrictions on local transportation had been relaxed, but none respecting this tax on cotton going from any of this Louisiana territory to a free market. This appears from the Regulations of May 9, 1865 (Plaintiff's Exhibit 10, Record 33), which Regulations, it should be observed, revoked all others on the subject.

The bringing of cotton to New Orleans did not of itself attach to it a liability to pay this tax under constructions contemplated in Proclamation of June 13 and June 24, because the circular letter of the Department, dated June 27, 1865 (Defendant's Exhibit 12), directed the Agent to return to the seller all property and money received or collected since those ates.

In the case of DeBar *vs.* United States, 11 Court Claims,

R. 676, where cotton came in before the 24th, and the money was collected after that date, a refund was made under decision of the Court. The time of actual payment of the money in all these transactions was the only date of which the officers took notice.

The Proclamation of June 13 applied to cotton as it was then territorily situated on the morning of that day, without regard to the place of production. A construction which would have required a separation of the eastern from the western Mississippi products would have rendered the Proclamations impossible of execution. Products may have been exchanged, as for instance, Mississippi cotton for Louisiana molasses; and at a time when the Mississippi river was no more an important line than the Red river, cotton may have been moved for safety or storage. A separation of the goods which happened to be found on the east side of the Mississippi river on the morning of June 13 was clearly not contemplated by the law. The rule applicable under similar peculiar circumstances must apply. Before the annexation of Texas, goods coming into the United States from south and west of Sabine river were subject to duty. After that State was annexed, the line of United States Customs Districts shifted to the Rio Grande, and whatever was within the territory of Texas at the time of annexation became property, duty free, within the United States, regardless whence it came or where it was produced.

HENRY C. BLISS, *of Counsel.*